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In The

Supreme Court of the United States

October Term, 1992

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,
Petitioners,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES OF WESTERN PENNSYVANIA, P.C., NEAL B. SIMMONS, M.D. and HARVEY L. NEIMAN, M.D.,
Respondents.

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,
Petitioners,

vs.

WYNNE COOPER, M.D.,
Respondent.

On Petition for Writ of Certiorari to the Superior Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Pennsylvania's Wrongful Birth Statute set forth in 42 Pa. C.S.A. § 8305(a) deprives a woman of her constitutional rights to due process and equal protection as provided by the Fourteenth Amendment of the United States Constitution?

A. Does the enactment of the Wrongful Birth Statute at 42 Pa. C.S.A. § 8305(a), by the Pennsylvania Legislature, constitute "state action" through its infringement on a woman's right to make an informed choice concerning pregnancy?

B. Does the Pennsylvania Wrongful Birth Statute at 42 Pa. C.S.A. § 8305(a) withstand strict scrutiny and further any compelling state or governmental interests?

II. Whether conflicting federal opinions on the constitutionality of the prohibition of wrongful birth causes of action need to be clarified by the Supreme Court of the United States?

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OPINIONS BELOW

In the instant action, there are five official opinions delivered by other Courts. The first opinion was authored by the Honorable James H. McLean of the Court of Common Pleas of Allegheny County, Pennsylvania dated January 22, 1991 (*see* Appendix F, p. 27a). Judge McLean sustained Respondents/Defendants' Preliminary Objections to Petitioners/Plaintiffs' Complaint by finding that Pennsylvania's Wrongful Birth Statute, 42 Pa. C.S.A. § 8305(a) barred the claims asserted and withstood constitutional challenge.

The second opinion delivered in this case was of the Honorable David S. Cercone of the Court of Common Pleas of Allegheny County, Pennsylvania dated June 28, 1991(*see* Appendix E, p. 21a). Judge Cercone granted the remaining Respondent/Defendant Wynne Cooper's Motion for Judgment on the Pleadings and determined that 42 Pa. C.S.A. § 8305(a) has a rational basis designed to meet a legitimate state interest and thus was constitutional.

After the filing of a timely appeal and consolidation of the two cases, the Superior Court of Pennsylvania entered a judgment affirming the Orders of the lower court on April 30, 1992 (*see* Appendix C, p. 5a). In an opinion written by the Honorable John P. Hester, the Superior Court upheld the constitutionality of Pennsylvania's Wrongful Birth Statute, 42 Pa. C.S.A. § 8305(a). A concurring opinion was filed by the Honorable Donald E. Wieand (*see* Appendix D, p. 6a).

Petitioners filed a timely Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. On January 6, 1993, a Per Curiam Order was entered denying the Petition (*see* Appendix E, p. 21a). Lastly, on February 12, 1993 the Supreme Court of Pennsylvania entered a second Per Curiam Order denying Petitioner's Application for Reargument (*see* Appendix A, p. 1a).

STATEMENT OF JURISDICTION

Jurisdiction over the instant action is vested in the Supreme Court of the United States pursuant to Rule 10.1(b) and (c) of the Rules of the Supreme Court of the United States and 28 U.S.C. § 1254. The Petitioners seek review of the Order of the Supreme Court of Pennsylvania dated January 4, 1993 denying the Petition for Allowance of Appeal and the Order of the Supreme Court of Pennsylvania dated February 12, 1993 denying Petitioners' Application for Reargument. Petitioners ultimately seek review of the Order of the Superior Court of Pennsylvania dated April 30, 1992 which affirmed the lower Court's dismissal of petitioners' causes of action.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

I. 42 Pa. C.S.A. § 8305 provides as follows:

> (a) Wrongful birth – There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for wrongful death of a woman, or on account of physical injury suffered by a woman or child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defense against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L. 1109, No. 261), known as the

> Osteopathic Medical Practice Act,1 the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, 2 or any other act regulating the professional practices of health care practitioners.
>
> (b) Wrongful life – There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act of omission of the defendant, the person would not have been conceived, would or should have been aborted.
>
> (c) Conception – A person shall be deem to be conceived at the moment of fertilization.
>
> 1988, April 13, P.L. 336, No. 47, Section 2, imd. effective.

II. The Fourteenth Amendment in pertinent parts provides as follows:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On or about June 8, 1988, Petitioner Taneika James, a teenager, learned of her pregnancy and obtained treatment from Respondent Wynne Cooper, M.D. On or about October 25, 1988, a sonogram ordered by Respondent Cooper was performed upon Petitioner James through Respondents Radiology Associates of Western Pennsylvania, P.C., Neal B. Simmons, M.D. and Harvey L. Neiman, M.D. at Respondent The Western Pennsylvania Hospital (*see* Appendix D, p. 7a).

Petitioners believe this sonogram clearly revealed an abnormality in the fetus which ultimately would require substantial medical care throughout the life of the later born child. Information concerning the existence of a fetal abnormality including potential risks and complications associated with her pregnancy, delivery and the later born child's condition and care, disclosed to Petitioner James by her physician in a timely fashion would have afforded her the opportunity to make an intelligent, informed choice between termination of her pregnancy and continuance full term until childbirth.

Petitioner James was denied this opportunity. She was neither informed of the sonogram results nor of any fetal abnormality until the choice of childbirth was her only viable option because the time for Petitioner James to have legally aborted her pregnancy had passed. Accordingly, Petitioner James has been required to endure extensive diagnostic testing, two onsets of premature labor and the pain of childbirth and the occurrence of continuing medical expenses for treatment and care of her child who suffers from quadrigeminal arachnoid cysts and hydrocephalus.

This case involves negligence claims brought by and on behalf of Louis Edmonds, a hydrocephalic child and by Taneika James, his mother for the medical expenses and damages associated with the child's permanent medical condition.

Preliminary Objections to Petitioners' Complaint in negligence were filed by all Respondents/Defendants on the basis that the Complaint failed to state a cause of action in light of 42 Pa. C.S.A. § 8305(a). Petitioners/Plaintiffs responded to the Preliminary Objections by challenging the constitutionality of 42 Pa. C.S.A. § 8305(a) in light of the protections afforded by the Fourteenth Amendment of the United States Constitution. Notice of this constitutional challenge of a Pennsylvania statute was properly given to the Commonwealth's Attorney General's office. The Preliminary Objections were sustained through a final Order of the Court of Common Pleas of Allegheny County by the Honorable James H. McLean, entered on November 30, 1990 (*see* Appendix D, pp. 7a-8a).

A Motion for Judgment on the Pleadings was filed by Respondent Cooper seeking dismissal of Petitioners/Plaintiffs' Complaint pursuant to 42 Pa.C.S.A. § 8305(a). Said Motion was granted on January 2, 1991 by the Honorable David S. Cercone (*see* Appendix D, p. 9a).

Petitioners filed a timely Notice of Appeal to the Superior Court of Pennsylvania and on March 13, 1991, the parties filed a Stipulation to Consolidate the Appeals. Again, Petitioners argued in their appeal that Pennsylvania's Wrongful Birth Statute (42 Pa.C.S.A. § 8305(a)) violated Petitioners' due process and equal protection rights afforded by the Fourteenth Amendment and contrary to the Supreme Court decision in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973) and its progeny.

On or about April 30, 1992, the Superior Court of Pennsylvania affirmed the two Orders of the Court of Common Pleas of Allegheny County, the first by the Honorable David S. Cercone, entered January 2, 1991 by granting a Motion for Judgment on the Pleadings filed by Respondent/Defendant Wynne Cooper, M.D. and the second Order entered by the Honorable James H. McLean sustaining Respondent/Defendant's (the

Western Pennsylvania Hospital, Radiology Associates of Western Pennsylvania, P.C., Neal B. Simmons, M.D. and Harvey L. Neiman, M.D.) Preliminary Objections and dismissing Petitioners' Complaint (*see* Appendix C, p. 5a).

The Superior Court of Pennsylvania, in affirming the two Orders of the lower court, reasoned that the Wrongful Birth Statute did not amount to "state action" and was designed to meet a legitimate state interest.

On or about June 1, 1992, Petitioner filed a timely Petition for Allowance of Appeal with the Supreme Court of Pennsylvania. In this Petition, Petitioners raised the unconstitutionality of the Wrongful Birth Statute and the important federal question at issue. Said Petition was denied by the Supreme Court of Pennsylvania, per curiam, on January 6, 1993. Petitioners then filed an Application for Reargument with the Supreme Court of Pennsylvania which was also denied, *per curiam*, on February 12, 1993. Accordingly, Petitioners had exhausted all appeal rights with the court of last resort in the Commonwealth of Pennsylvania and therefore files this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

Introduction

Since the landmark decision of *Roe v. Wade*, 410 U.S. 113 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973), courts have acknowledged that public policy now supports, rather than mitigates against, the proposition that a woman must not be impermissibly denied a full opportunity to make a decision on whether to have an abortion or carry to term a child. *Berman v. Allen*, 80 N.J. 421, 432, 404 A.2d 8, 14 (1979).

Since *Roe*, the ability of medical scientists to predict or detect defects in the unborn has expanded significantly. Advances in the

field of prenatal screening and diagnosis have altered the applicable standard of care and for physicians now require appropriate testing and counseling for women at risk of bearing children with birth defects. *Harbeson v. Park-Davis, Inc.*, 746 F.2d 517 (9th Cir. 1984). Thus, courts have held that general principles of tort law require that physicians who negligently deprive a mother of the right to terminate her pregnancy in the face of a fetal defect must be held liable for the damages which are proximately caused therefrom.[1] Any other ruling would in effect immunize from liability those in the medical field providing inadequate guidance to persons who would choose to exercise their constitutional right to avoid the birth of a genetically deformed fetus. *Berman v. Allen, supra.* Under such actions, parents are awarded damages in an effort to compensate them for the cost of raising a handicapped child that, but for the negligence of a health-care provider, would have been aborted.

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1. To date, twenty-three jurisdictions recognize some cause of action for wrongful birth. *See Gallagher v. Duke University*, 852 F.2d 773 (4th Cir. N.C. 1988), *(reh'g denied)*; *Robak v. The United States*, 658 F.2d 471 (7th Cir. Ill. 1981) (applying Alabama law); *Phillips v. United States*, 575 F. Supp. 1309 (D.S.C. 1983); *Turpin v. Sortina*, 31 Cal. 3d 220, 182 Cal. Rptr. 337, 643 P.2d 943 (1982); *Lininger v. Eisenbaum*, 764 P.2d 1202 (Col. 1988); *Haymon v. Wilkerson*, 535 A.2d 880 (D.C. 1987); *Fassoulas v. Ramy*, 450 F.2d 822 (Fla. 1984); *Blake v. Cruz*, 108 Idaho 253, 698 P.2d 315 (1984); *Siemieniec v. Lutheran General Hospital*, 134 Ill. App. 3d 823 and 89 Ill. Dec. 484, and 480 N.E.2d 1227 (lst Dist. 1985); *Arche v. United States, Department of Army*, 247 Kan. 276 and 798 P.2d 477 (1990); *Pitre v. Opelousas General Hospital*, 530 S.2d 1151 (La. 1988); *Viccaro v. Melunasky*, 406 Mass. 77 and 551 N.E. 2d 8 (1990); *Proffit v. Bartolo*, 162 Mich. App. 35 and 412 N.W. 2d 232 (1937)*(app. denied)*; *Smith v. Cote*, 128 N.H. 231, 513 A.2d 341 (1986); *Hummel v. Riess*, 129 N.J. 118, 608 A.2d 1341 (1992); *Bani- Esraili v. Wald*, 127 Misc. 2d 202, 45 N.Y.S. 2d 708 (1985); *Speck v. Finegold*, 497 Pa. 77, 439 A.2d 110 (1981); *Jacobs v. Theimer*, 519 S.W. 2d 846, 1810 Supp. Ct. J. 222 (Tex. 1975); *Naccash v. Burger*, 223 Va. 406 , 290 S.E. 2d 825 (1982); *Harbinson v. Parke-Davis, Inc.*, 98 Wash. 2d 460, 656 P.2d 483 (1983); *James G. v. Caserta*, 332 S.E. 2d 872 (W. Va. 1985); *Dumer v. St. Michaels Hospital*, 69 Wisc. 2d 766, 233 N.W. 2d 372 (1975); *Beardsley v. Wierdsma*, 650 P.2d 288 (Wyo. 1982).

Although state legislatures enjoy a wide latitude in regulating tort actions, in doing so they may not impermissibly interfere with the rights implicitly or explicitly protected by the Constitution. *Munn v. Illinois,* 94 U.S. 113, 143 (1987); *Hickman v. Group Health Plan, Inc.,* 396 N.W. 2d 10 (Minn. 1986).

Pennsylvania has enacted a statute, 42 Pa. C.S.A. § 8305(a) which effectively denies a woman her constitutional right to make an informed decision to terminate her pregnancy by absolving physicians from any and all liability should they negligently fail to provide appropriate prenatal information to expectant mothers. For the reasons set forth below, Petitioners seek a Writ of Certiorari from this Court in order to establish the constitutionality of the Pennsylvania statute.

I.

THE CONSTITUTIONALITY OF LAWS PROHIBITING WRONGFUL BIRTH ACTIONS IS UNCLEAR AS THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH AND ELEVENTH CIRCUITS HAVE REACHED IMPLICITLY DIFFERENT HOLDINGS ON THE ISSUE.

In assessing the constitutionality of Pennsylvania's prohibition on wrongful birth causes of action, petitioners find themselves with apparently conflicting federal opinions. While the Court of Appeals for the Eleventh Circuit has upheld a cause of action for wrongful birth (*Robak v. United States of America,* 658 F.2d 471 (7th Cir. 1981)), the Court of Appeals for the Seventh Circuit has permitted such a claim to be barred by state law (*Campbell v. United States,* 962 F.2d 1579 (11th Cir. 1992)). Accordingly, pursuant to Rule 10(a) of the Rules of the Supreme Court of the United States, petitioners seek to have this court clarify the constitutionality of a prohibition of wrongful birth causes of action.

In *Robak v. United States of America*, 658 F.2d 471 (7th Cir. 1981), the Seventh Circuit Court of Appeals was faced with the issue of whether a pregnant mother had a valid cause of action against a hospital for the hospital's failure to diagnose the pregnant mother's rubella and further failure to inform her of the possible dangers to the fetus should the pregnancy proceed to term. The Court of Appeals held that an action for wrongful birth was permitted under Alabama law.

As the issue had not been addressed in Alabama, the Circuit Court looked to sister state laws as well as the constitutional rights protected by this Court's holding in *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d. 694 (1973). *Robak* at 474-475. In finding that wrongful birth actions were valid, the *Robak* court stated, "*Any other ruling* would in effect immunize from liability those in the medical field providing inadequate guidance to persons who choose to exercise their constitutional right to abort fetuses . . . ." *Id.* at 475, *citing Berman v. Allen*, 80 N.J. 421, 404 A.2d 8 (1971)[emphasis added].

When faced with a very similar cause of action, however, the Court of Appeals for the Eleventh Circuit refused to permit a cause of action for wrongful birth under Georgia law. *Campbell v. United States*, 962 F.2d 1579 (11th Cir. 1992). In *Campbell*, the court was presented with the question of whether the parents of a disabled child had a valid cause of action against a physician for failing to timely diagnose the fetus' severe abnormalities such that the mother could exercise her right terminate the pregnancy. The Georgia Supreme Court had previously ruled that no such cause of action was recognized in the state. Plaintiffs in *Campbell* challenged the constitutionality of that Georgia decision.

The Court of Appeals in *Campbell* found that the Georgia Supreme Court's refusal to recognize a cause of action for wrongful birth did not violate the United States Constitution. According to the court, Georgia's failure to protect plaintiffs from

a private physician's negligence did not amount to state action.[2]

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2. The *Campbell* court premises much of its "no state action" decision upon this Court's holding in *Flagg Bros., Inc., et al. v. Brooks et al.*, 436 U.S. 149, 98 S. Ct. 1729, 56 L. Ed. 2d 185 (1978).

However, the basis for finding no state action in *Flagg Bros.* is not applicable to petitioners' case.

In *Flagg Bros.*, the parties sought to declare unconstitutional a provision of New York's Uniform Commercial Code which permitted a private warehouseman to enforce a valid lien by selling goods entrusted to the warehousemen. The parties whose goods were to be sold alleged that New York's adoption of U.C.C. § 7-210 constituted state action that deprived them of their property in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The court found *no state action* stating:

> There is no reason whatever to believe that either Flagg Brothers or respondents could not, if they wished, seek resort to the New York courts in order to either compel or prevent the 'surrendering of property' . . . . The lien in this case . . . provides for compensatory remedy and judicial relief against abuse . . . . The conduct of private actors in relying on . . . these liens to resort to self-help remedies does not permit conduct to be ascribed to the state.

Flagg Bros., 436 U.S. at 163.

In essence, this court found that the state's approval of self help remedies did not "delegate to Flagg Brothers an exclusive prerogative of the sovereign." *Id.*, 436 U.S. at 159. The statute itself provided for remedies against the warehouseman. *Id.*

In the instant case, the Pennsylvania legislature, through 42 Pa.C.S.A § 8305(a), has taken away *all* legal redress for women whose constitutional right to abortion has been infringed by the negligence of an physician. Said facts are quite different from *Flagg Bros.* and constitute sufficient state action to invoke the Fourteenth Amendment.

Accordingly, the requisite finding of state action, plaintiff's equal protection and due process challenges failed.

It is difficult to imagine that the Seventh Circuit Court of Appeals in *Robak* did not factor into its decision the same due process and equal protection considerations raised in *Campbell.* Despite the *Robak* court found that "any other holding" other than a *validation* of wrongful birth claims, would affect a party's constitutional right to choose under *Roe. Robak,* 658 F.2d at 475.

The *Robak* and *Campbell* decisions are hard to reconcile. One could argue that the cases in question are not inconsistent but simply factually distinct. In the *Robak* case, the court validated a wrongful birth claim in a state that had *not* taken any action on the issue. The *Campbell* court, on the other hand, was faced with a wrongful birth claim in a state whose highest court had prohibited such actions. Accordingly, it could be argued that each court reached a different result under different circumstances.

However, it is the very factual distinctions between the cases which highlight their *legal* inconsistency. How is it that in the *absence* of any state decision, the *Robak* court found a constitutionally implicated right to bring a wrongful birth cause of action, *but* in the face of an *existing state decision* prohibiting wrongful birth claims, the *Campbell* court found no state action and no constitutional right to bring a wrongful birth action?

As mentioned previously, twenty-three states recognize some form of action for wrongful birth.[3] Five of those states have based their decisions on *Roe v. Wade.*[4] In light of the growing disparity between jurisdictions, petitioners seek to have this court determine

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3. *See footnote 1.*

4. *Robak v. The United States,* 658 F.2d 471 (7th Cir. Ill. 1981) (applying Alabama law); *Haymon v. Wilkerson,* 535 A.2d 880 (D.C. 1987); *Blake v. Cruz,* (Cont'd)

the constitutionality of a state's prohibition of wrongful birth causes of action.

II.

PENNSYLVANIA'S PROHIBITION AGAINST WRONGFUL BIRTH ACTIONS SET FORTH IN 42 PA. C.S.A. § 8305(A) DEPRIVES A WOMAN OF HER CONSTITUTIONAL RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE UNITED STATES CONSTITUTION.

A. State Action.

In order to assert a violation of due process or equal protection under the United States Constitution, a party must prove requisite state action. *Shelly v. Kraemer,* 334 U.S. 1, 13, 68 S. Ct. 836, 842 (1948). Private conduct may be treated as state action for purposes of the Fourteenth Amendment if the conduct has received the imprimatur of the state. *Blum v. Yaretsky,* 457 U.S. 991, 1003, 102 S. Ct. 2777 (1982). Further, a state can be held responsible for a private decision when the state undertakes "significant encouragement," (even covertly), sufficient that the choices made in light of that encouragement must be deemed to be that of the state. *Blum,* 457 U.S. at 1004, 1005, 102 S. Ct. at 2876. Although the definition of state action is somewhat imprecise, a state in any of its manifestations may become so significantly involved in private discrimination that its actions constitute state action. *Hickman v. Group Health Plan, Inc.,* 396 N.W. 2d 10, 18 (dissenting opinion).

At issue in the instant case is the state's infringement on a woman's constitutional right to terminate a pregnancy under *Roe v.*

(Cont'd)

108 Idaho 253, 698 P.2d 315 (1984); *Smith v. Cote,* 128 N.H. 231, 513 A.2d 341 (1986); *Hummel v. Riess,* 129 N.J. 118, 608 A.2d 1341 (1992).

Wade, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). In *Roe*, this Court held that a woman's *decision* as to whether to undergo an abortion is a privacy right, constitutionally protected under the Fourteenth Amendment. *Roe*, 410 U.S. at 153, 93 S. Ct. at 726 (emphasis added). Specifically, this right "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy." *Id.* at 153, 93 S. Ct. at 726.

Under 42 Pa. C.S.A. § 8305(a), the legislature of the State of Pennsylvania has directly acted to immunize health care providers from liability should they negligently interfere with a woman's decision making process under *Roe*. In pertinent part, 42 Pa. C.S.A. § 8305(a) reads:

> (a) Wrongful birth—there shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born . . . .

(*See* Appendix D, p. 8a).

Liability acts as a deterrent to malpractice, *Blake v. Cruz*, 108 Idaho 253, 698 P.2d 315 (1984), and encourages the side objectives of proper prenatal testing, genetic counseling, and informed decision making. Under 42 Pa. C.S.A. § 8305(a), a defendant health care provider may, with the express approval of the state and without fear of recourse, negligently deprive a woman of the information necessary to exercise her constitutional right to make an informed decision as to whether to terminate her pregnancy. Pennsylvania has chosen to offer immunity to such conduct via statute. It is plaintiffs' contention that state sanctioned removal of liability for wrongful birth claims is a direct infringement on a woman's right to make an informed choice concerning her pregnancy.

While it appears on the surface that it is the health care provider's conduct, and not the state's, which deprives a woman of her right to choose, this deprivation carries with it the approval and support of the state via statute. It is axiomatic that the very essence of the relationship between a physician and a pregnant woman revolves around that woman's desire to effectively and responsibly obtain information in order to make personal decisions concerning her pregnancy. By removing liability of health care providers, the legislature of the state of Pennsylvania has removed the only safeguard that women can rely upon in protecting the medical information that is essential to their right to make an informed decision.

In the instant case, the state of Pennsylvania has stepped into the private physician-patient relationship, and directly altered the legal landscape under which a woman exercises her constitutional right to choose as set forth in *Roe, supra.*

At least one court has found that a state's failure *to enact* legislation recognizing wrongful birth actions does not violate the constitutional protections of the Fourteenth Amendment. *Campbell v. United States, supra.* However, in the instant case, the Pennsylvania legislature has affirmatively acted to absolve physicians from liability should they interfere with the decision making process of women contemplating abortion.

The constitutionality of 42 Pa. C.S.A. § 8305(a) has not yet been reviewed by the Supreme Court of Pennsylvania (that state's highest court), nor by any federal courts in the jurisdiction. Although lower court decisions in the state have ruled that 42 Pa. C.S.A. § 8305(a) does not *directly* interfere with a woman's right to choose, *Dansby v. Thomas Jefferson University Hospital,* No. 92-706, __ A.2d __, 1993 Pa. Super. Lexis 950 (1993),[5] it is

5. This opinion was handed down on March 19, 1993 and has not yet been released for publication in the slip opinions or permanent law reports.

petitioner's position that the actual *impact* and *effect* of the statute encourages such conduct.

In *Hickman v. Group Health Plan. Inc.*, 396 N.W. 2d 10 (1986), the Supreme Court of Minnesota grappled with this very issue. A divided court (four to three) ultimately found no cause of action for wrongful birth. Writing for three minority justices, Chief Justice Amdahl wrote a spirited dissent. In that dissent, Chief Justice Amdahl wrote:

> The possibility that a doctor will be held responsible for negligent conduct stands as a safeguard that the woman will be fully informed. The legislature's removal of the negligence action safeguard, while not preventing a woman from actually obtaining an abortion, *does* harm the complete exercise of a woman's rights under *Roe*. I see this as a direct infringement on the informed decision making process as enunciated in *Roe*.

Hickman, at 19 (emphasis added).

Thus, the state has placed its imprimatur on conduct which will directly interfere with a woman's rights under *Roe, supra*. Such government approval is sufficiently significant under the facts of this case to be deemed "state action."

B. Due Process.

The due process clause of the Fourteenth Amendment guarantees the right of freedom of choice in matters of personal family life, child bearing and rearing, and termination of pregnancy. Under *Roe v. Wade, supra* and its progeny, a woman has a constitutionally protected right to decide, free from

governmental intrusion, whether to terminate her pregnancy. Courts have consistently struck down statutes which impose or restrict this procreative freedom of a woman. *Bellotti v. Baird*, 443 U.S. 622 (1979); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1986); *Sendak v. Arnold*, 429 U.S. 1968 (1978). However, a due process challenge to 42 Pa. C.S.A. § 8305(a) has never been heard by the Supreme Court of Pennsylvania or by any federal court in the jurisdiction.

It is plaintiffs' contention that Pennsylvania's prohibition against wrongful birth actions under 42 Pa. C.S.A. § 8305(a) infringes upon a woman's fundamental right to choose as espoused in *Roe* and it progeny.

In *Planned Parenthood of Southeastern Pennsylvania, et al. v. Robert P. Casey, et al.*, __ U.S.__, 112 S. Ct. 2791, 120 L. Ed. 2d 674, 60 L.W. 4795 (June 29, 1992), this Court reasoned that the state's regulation of abortion was limited such that an undue burden may not be placed on a woman's decision to terminate. That same test must be applied in the instant case.

Pennsylvania's wrongful birth statute (42 Pa. C.S.A. § 8305(a)) goes far beyond placing an undue burden on a woman's ability to make the decision whether to terminate a pregnancy. The statute effectively validates the nondisclosure of vital information needed in order for a woman to exercise her constitutional rights under *Roe*. In the instant case, the negligent acts and procedures undertaken by the defendants put petitioners in the position of being unable to make an informed decision as to whether to carry to term a handicapped child. *Robak v. United States*, 658 F.2d 471 (7th Cir. 1981). Pennsylvania's statute precludes petitioner from seeking *any* remedy for this deprivation of rights.[6]

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6. In *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 98 S. Ct. 260, 57 L. Ed. 2d 595 (1978), this Court left open the question of whether a legislatively enacted prohibition on common law remedies must offer (Cont'd)

Under the Fourteenth Amendment to the United States Constitution, state action which infringes upon a fundamental interest (such as the right of procreation) is subject to a strict scrutiny standard of review. *United States v. Carolene Products Co.*, 304 U.S. 254 (1938). The issue of abortion touches upon fundamental interests of privacy and liberty. *Roe, supra; Harris v. McRae*, 448 U.S. 297, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). Accordingly, there can be little argument that the Pennsylvania statute in question is subject to strict scrutiny review.

Under that standard of review, the state bears the burden of showing that it has a compelling governmental interest and the actions taken in furtherance of that interest are narrowly tailored. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

In the context of a woman's right to choose to terminate her pregnancy, this Court has found only two interests sufficiently compelling to justify interference with a woman's right to choose: (1) protecting the health of the mother; and (2) protecting the potential life of the fetus. *Roe*, 410 U.S. at 155. Pennsylvania's prohibition on wrongful birth actions does not fall into either of these two categories.

42 Pa. C.S.A. § 8305(a) cannot be justified by concerns for maternal health because it lowers the enforceable standard of care exercised by physicians. It therefore diminishes the medical information available to a woman and increases the risks to her health. *Hickman*, 396 N.W.2d at 20.

(Cont'd)

a *quid pro quo* substitute in order to satisfy the Due Process Clause of the Fourteenth Amendment. *Duke Power Co.* 438 U.S. at 87-88, 98 S. Ct. at 2637-2638, 57 L. Ed. 2d __. While *limiting liability* for certain conduct was found to be fairly common, *abolishing* certain liability and leaving no comparable remedy in its place was questioned but never addressed. *Id.* This case presents this very issue.

The statute in question also does not protect the potential unborn fetus, as the compelling interests of the state do not come into existence until the fetus is viable. *Roe*, 410 U.S. at 160. In the instant case, it is plaintiffs' contention that the negligence occurred prior to viability. Accordingly, there was no compelling governmental interest to protect.

In sum, there is no compelling governmental interest in 42 Pa. C.S.A. § 8305(a). As the statute directly acts to infringe the woman's right to choose under *Roe*, the statute cannot withstand constitutional scrutiny and must be declared unconstitutional and in violation of the Due Process Clause of the Fourteenth Amendment.

C. Equal Protection.

Pennsylvania's prohibition on wrongful birth actions singles out a group of parents making a procreative decision when that decision involves abortion. The statute does not, however, bar an action for negligence where a physician has interfered with a couple's *right to conceive. Hatter v. Landsberg*, 563 A.2d 146, 386 Pa. Super. 438 (1989), *appeal denied*, 578 A.2d 414. In fact, the courts in Pennsylvania have found that the legislative history of 42 Pa. C.S.A. § 8305(a) was primarily concerned with eliminating suits brought by parents seeking to recover damages for failure to abort a child or negligently aborting a child, while permitting claims for negligent sterilization. *Id.* (*See* Appendix D, p. 19a).It is plaintiff's contention that such a classification subordinates the privacy rights of a women in favor of non-compelling state interests. Such subordination is unconstitutional. *Thornberg v. American College of Obstetricians*, 476 U.S. 477, 106 S. Ct. 2169, 90 L. Ed. 2d 779 (1986).

By creating a classification of persons who are precluded from bringing tort actions, 42 Pa.C.S.A. § 8305(a) eliminates a legal remedy for women who would have chosen to exercise their

fundamental right to choose. In order for a state statute to justify burdening a fundamental interest under the equal protection clause of the Fourteenth Amendment (in this case the right to choose an abortion), the statute must withstand strict scrutiny and accordingly must be based upon a compelling state interest. *Skinner v. Oklahoma*, 316 U.S. 353 (1942). Pennsylvania's wrongful birth statute fails to withstand strict scrutiny.

As set forth by Judge David Cercone in the lower court opinion in this case (*see* Appendix E, pp. 25a-26a), the recognized state interests in prohibiting wrongful *birth* causes of action are: (1) encouraging childbirth over abortion in an effort to avoid placing a value on handicapped children, (2) avoiding having the legislature dictate to the medical community how to practice obstetrics, and 3) reducing the number of medical malpractice actions in an effort to bring down insurance costs. *Id.*

First, *encouraging childbirth over abortion and reducing medical costs* cannot constitute a compelling governmental interest in violating petitioners' equal protection rights under the United States Constitution. If Pennsylvania's wrongful birth statute encourages childbirth, it does so only by sanctioning negligent medical treatment. The statute specifically permits physicians to negligently withhold information essential to a parent's procreative decision making process as set forth in *Roe, supra.* That decision making process has been consistently reaffirmed by this Court. *Roe v. Wade, supra; Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S. Ct. 3040, 106 L. Ed. 2d 410 (1989); *Planned Parenthood Association v. Ashcroft*, 462 U.S. 476, 103 S. Ct. 2517, at 76 L. Ed. 2d 733 (1983). In reality, the statute does not encourage decision making in favor of childbirth, but instead prevents informed decision-making altogether.

Further, the legislature in Pennsylvania clearly has not chosen

the least restrictive means of furthering their espoused interests. Banning any and all recovery for negligent pre-natal testing and counseling is a draconian means of bringing down health care costs and promoting the value of human life. The statute single-handedly eliminates *all* recovery for negligence that interferes with a women's constitutional rights. Such a statute strikes at the very core of the equal protection clause of the Fourteenth Amendment.

Finally, the state interest of *seeking to avoid dictating to the medical profession how to practice obstetrics* flies in the face of the most fundamental common law tort principles. As set forth in *Robak v. United States,* 658 F.2d at 476. a wrongful life cause of action is little different from an ordinary malpractice action. "It involves a failure by a physician to meet a required standard of care, which resulted in specific damages to the plaintiff." *Robak* at 476 *citing Becker v Schwartz,* 46 N.Y. 2d 401, 386 N.E. 2d 807 (1978).

The Supreme Court of Pennsylvania specifically recognized an injured parties right to recover for such negligence in *Speck v. Finegold,* 497 Pa. 77, 439 A.2d 110 (1981). The court found that permitting a wrongful birth action would: (1) neither inhibit nor promote abortions in the Commonwealth; (2) preserve a women's constitutional right to choose under *Roe v. Wade, supra* and (3) best served public policy by permitting discovery for this type of injury. *Speck,* 439 A.2d at 114, 115.

The legislature's alleged interests in now banning wrongful birth causes of action does not withstand constitutional scrutiny. The espoused state interest is neither compelling nor narrowly tailored to remedy the interests set forth. By closing the court doors to only those persons who would have chosen to exercise their rights under *Roe,* 42 Pa.C.S.A. § 8305(a) violates the equal protection clause of the Fourteenth Amendment.

CONCLUSION

It is clear from a review of the opinions of the Superior Court of Pennsylvania and the legislative intent behind the enactment of 42 Pa. C.S.A. § 8305(a), a continuing erosion of the rights and protections afforded by the Fourteenth Amendment and *Roe v. Wade, supra* is taking place. In light of the protections set forth in *Planned Parenthood of Southeastern Pennsylvania v. Robert P. Casey et al., supra,* Pennsylvania's Wrongful Birth Statute is an unreasonable and unjustifiable restriction on the flow of information to pregnant women.

Furthermore, the issue of the viability of a wrongful birth cause of action is producing conflicting decisions and opinions, not only in the lower courts of different jurisdictions, but also in separate circuits of the United States Circuit Court of Appeals. Petitioners pray that Your Honorable Court grant their Petition for a Writ of Certiorari and review the contradictions of the lower courts regarding the constitutionality of Pennsylvania's Wrongful Birth Statute.

Respectfully submitted,

BRUCE S. GELMAN
Attorney for Petitioners
1701 Law & Finance Building
Pittsburgh, PA 15219
(412) 288-9200

APPENDIX A — PER CURIAM ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING APPLICATION FOR REARGUMENT DATED FEBRUARY 12, 1993

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Charles W. Johns, Esquire
Prothonotary

Irma T. Gardner
Deputy Prothonotary

801 City-County Building
Pittsburgh, Pa.
15219-2463
(412) 565-2816

February 12, 1993

Bruce S. Gelman, Esquire
Janet S. Livengood, Esquire
1701 Law & Finance Building
Pittsburgh, PA 15219

In Re: Louis Edmonds, a minor by Taneika James, et al. v. The Western Pa. Hospital, etc., et al.
Louis Edmonds, a minor by Taneika James, et al. v. Wynne Cooper, M.D.
No. 0280 W.D. Allocatur Docket 1992

Dear Mr. Gelman and Ms. Livengood:

The Court has entered the following Order on your Application for Reargument in the above-captioned matter:

"February 12, 1993
Petition Denied
Per Curiam"

Very truly yours,
s/ Irma T. Gardner
Irma T. Gardner
Deputy Prothonotary

ITG/dal
cc: Richard J. Federowicz, Esq.
Elaine S. Nace, Esq.
Giles J. Gaca, Esq.
Honorable James H. McLean
Honorable David S. Cercone

APPENDIX B — PER CURIAM ORDER OF THE SUPREME COURT OF PENNSYLVANIA DENYING PETITION FOR ALLOWANCE OF APPEAL DATED JANUARY 7, 1993

SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

Charles W. Johns, Esquire
Prothonotary

Irma T. Gardner
Deputy Prothonotary

801 City-County Building
Pittsburgh, Pa.
15219-2463
(412) 565-2816

January 7, 1993

Bruce S. Gelman, Esquire
Janet S. Livengood, Esquire
1701 Law & Finance Building
Pittsburgh, PA 15219

In Re: Louis Edmonds, a minor by Taneika James, et al. v. The Western Pa. Hospital, etc., et al.
Louis Edmonds, a minor by Taneika James, et al. v. Wynne Cooper, M.D.
No. 0280 W.D. Allocatur Docket 1992

Dear Mr. Gelman and Ms. Livengood:

The Court has entered the following Order on your Petition for Allowance of Appeal in the above-captioned matter:

"January 6, 1993
Petition Denied
Per Curiam"

Appendix B

Very truly yours,
s/ Irma T. Gardner
Irma T. Gardner
Deputy Prothonotary

ITG/dal
cc: Richard J. Federowicz, Esq.
Elaine S. Nace, Esq.
Giles J. Gaca, Esq.
Honorable James H. McLean
Honorable David S. Cercone

APPENDIX C — JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA DATED APRIL 30, 1992

SUPERIOR COURT OF PENNSYLVANIA
PITTSBURGH DISTRICT

No. 83 Pittsburgh 1991

Louis Edmonds, A Minor by Taneika James, Mother etc.

Appellants

v

The Western Pennsylvania etc.

No. 146 Pittsburgh 1991

Louis Edmonds, A Minor by Taneika James etc.

v

Wynne Cooper, M.D.

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Allegheny County be, and the same is hereby ORDERS AFFIRMED.

BY THE COURT:

s/ Eleanor R. Valecho
DEPUTY PROTHONOTARY

DATED: April 30, 1992

APPENDIX D — OPINIONS OF THE SUPERIOR COURT OF PENNSYLVANIA DATED APRIL 30, 1992

No. 00083 Pittsburgh, 1991

IN THE SUPERIOR COURT OF PENNSYLVANIA

LOUIS EDMONDS, a Minor by TANEIKA JAMES, Mother and Natural Guardian, and TANEIKA JAMES, in her own right,

Appellants

v.

THE WESTERN PENNSYLVANIA HOSPITAL RADIOLOGY ASSOCIATES of WESTERN PENNSYLVANIA P.C., NEAL B. SIMMONS, M.D., and HARVEY L. NEIMAN, M.D.

Appeal from the Order Dated November 30, 1990, Docketed December 3, 1990, in the Court of Common Pleas of Allegheny County, Civil Division, at No. 90-16421.

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 00146 Pittsburgh, 1991

LOUIS EDMONDS, a Minor by TANEIKA JAMES, Mother and Natural Guardian, and TANEIKA JAMES, in her own right,

Appellants

v.

WYNNE COOPER, M.D.

Appeal from the Order Entered January 2, 1992, in the Court of Common Pleas of Allegheny County, Civil Division, at No. GD89-18962.

Appendix D

BEFORE: CAVANAUGH, WIENAND, and HESTER, JJ.

OPINION BY HESTER, J.: FILED: April 30, 1992

This is a consolidated appeal from orders entered in the Court of Common Pleas of Allegheny County on November 30, 1990, and January 2, 1991. Those orders, which respectively sustained certain preliminary objections in the nature of a demurrer and granted Wynne Cooper, M.D., judgment on the pleadings, disposed of actions arising from circumstances related to the pregnancy of Taneika James and the birth of her physically impaired son, Louis Edmonds. For the reasons set forth below, we affirm.

The procedural history of the first appeal, number 00083 Pittsburgh, 1991, may be summarized as follows. On September 25, 1990, Ms. James, on behalf of herself and her son, filed a complaint against the Western Pennsylvania Hospital, Radiology Associates of Western Pennsylvania, P.C., Neal B. Simmons, M.D., and Harvey L. Neiman, M.D. In that complaint, Ms. James asserted that a sonogram taken during her pregnancy revealed a fetal abnormality, alleged that she was not informed of that condition in a timely fashion, and implied that she would have sought an abortion had she been so informed. Consequently, Ms. James requested damages arising from both the pregnancy and the birth of her son. In addition, she sought damages on behalf of her son for the pain and complications associated with his impairment as well as the treatment it rendered necessary.

Shortly after initiating the action, appellants amended their complaint to clarify the relationship between the individual and institutional medical providers. Thereafter, appellees, relying upon the statutory prohibition against causes of action premised

upon a claim that a person should not have been born, *see* 42 Pa.C.S. § 8305, filed preliminary objections in the nature of a demurrer.[1] On November 30, 1990, the trial court entered the challenged order sustaining those objections. Appellants subsequently filed a timely notice of appeal.

---

1. 42 Pa.C.S. § 8305 (footnotes omitted) states:

> § 8305. Actions for wrongful birth and wrongful life
>
> (a) Wrongful birth. —There shall be no cause of action or award of damages on behalf of any person based on a claim that, for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman, or on account of physical injury suffered by a woman or a child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defense against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or any other act regulating the professional practices of health care practitioners.
>
> (b) Wrongful life. —There shall be no cause of action on behalf of any person based on a claim that, but for an act or omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.
>
> (c) Conception. —A person shall be deemed to be conceived at the moment of fertilization.

Appendix D

We now turn to appeal number 00146 Pittsburgh, 1991. On January 3, 1989, appellants initiated proceedings against Wynne Cooper, M.D., by filing a praecipe for writ of summons. Subsequently, following the reissuance of the writ and the effectuation of service, they filed a complaint which contained allegations substantially similar to those previously described. The parties then filed additional pleadings and proceeded with discover. On September 11, 1990, after appellants requested a jury trial, Dr. Cooper moved for judgment on the pleadings contending that the causes of action asserted by appellants were barred by 42 Pa.C.S. § 8305. Four months later, the trial court entered the order granting the requested relief. Appellants filed a timely notice of appeal, and we consolidated the action with appeal number 00083 Pittsburgh, 1991, for argument and disposition.

It has long been clear that we have an obligation to consider the appropriateness of each appeal and that such consideration may be undertaken sua sponte. *Gatten v. Merzi*, 397 Pa. Super. 148, 579 A.2d 974 (1990) (*per curiam*). Moreover, we note that absent a specific statutory provision to the contrary, any appeal determined to be interlocutory must be quashed. *Id.* With these principles in mind, we sua sponte address the propriety of the present appeals.

Our review of the record relating to appeal number 00146 Pittsburgh, 1991, clearly establishes that it was taken from a final order and that it is properly before us for disposition. *See Indiana County Hospital Authority v. McCarl's Plumbing & Heating Co.*, 344 Pa.Super. 276, 496 A.2d 767 (1985) (*per curiam*) (order granting judgment on the pleadings is a final order and therefore, appealable). With respect to the remaining appeal, we note that the order sustaining the preliminary objections of the various medical providers did not dismiss appellants' complaint or explicitly dispose of the action; however, it effectively terminated the

proceedings. Therefore, we find that order also to be final and appealable. *See Hudock v. Donegal Mutual Insurance Co.*, 438 Pa. 272, 264 A.2d 668 (1970) (order which sustains preliminary objections in the nature of a demurrer without explicitly terminating the action is final and appealable if it effectively terminates action). Accordingly, we turn to the merits of the two appeals.

The standards utilized in reviewing the propriety of decisions either sustaining preliminary objections in the nature of a demurrer or entering judgment on the pleadings are well-established. With respect to the former decisions, we note:

> It is axiomatic in the law of pleading that preliminary objections in the nature of a demurrer admit as true all well and clearly pleaded material, factual averments and all inferences fairly deducible therefrom. *Yania v. Bigan*, 397 Pa. 316, 155 A.2d 343 (1959); *Byers v. Ward*, 368 Pa. 416, 84 A.2d 307 (1951). Conclusions of law and unjustified inferences are not admitted by the pleading. *Lerman v. Rudolf*, 413 A.2d 555, 198 A.2d 532 (1964). Starting from this point of reference the complaint must be examined to determine whether it sets forth a cause of action which, if proved, would entitle the party to the relief sought. If such is the case, the demurrer may not be sustained. On the other hand, where the complaint fails to set forth a cause of action, a preliminary objection in the nature of a demurrer is properly sustained.

Appendix D

Greenspan v. United Services Automobile Assn., 324 Pa.Super. 315, 318, 471 A.2d 856, 857-58 (1984), quoting *Rose v. Wissinger*, 294 Pa.Super. 265, 439 A.2d 1193 (1982). In connection with the latter decisions, we have indicated:

> Entry of judgment on the pleadings is permitted under Pa.R.C.P. 1034 which provides for such judgment after the pleadings are closed, but within such time as not to delay trial. A motion for judgment on the pleadings is similar to a demurrer. *Karns v. Tony Vitale Fireworks Corporation*, 436 Pa. 181, 259 A.2d 687 (1969). It may be entered where there are no disputed issues of fact and the moving party is entitled to judgment as a matter of law. *Gallo v. J.C. Penney Casualty Insurance Co.*, 328 Pa.Super. 267, 476 A.2d 1322 (1984); *Vogel v. Berkley*, 354 Pa.Super. 291, 511 A.2d 878 (1986); *Groff v. Pete Kingsley Building, Inc.*, 374 Pa.Super. 377, 543 A.2d 128 (1988). In determining if there is a dispute as to facts, the court must confine its consideration to the pleadings and relevant documents. *DiAndrea v. Reliance Savings & Loan Association*, 310 Pa.Super. 537, 456 A.2d 1066 (1983). The scope of review on appeal from the grant of judgment on the pleadings is plenary. We must determine if the action of the court below was based on a clear error of law or whether there were facts disclosed by the pleadings which should properly go to the jury. *Keystone Automated Equipment Co. v. Reliance Insurance Co.*, 369 Pa.Super. 472, 535 A.2d 648 (1988).

Koser v. Harleysville Mutual Insurance Co., __ Pa. Super. __, __, 595 A.2d 128, 129-30 (1991). In the present cases, the various motions of appellees were premised upon the contention that appellants' claims supported no causes of action in light of 42 Pa.C.S. § 8305. Appellants' challenge to the trial courts' decisions on those motions concerns only the personal claims of Ms. James. In addition, we note that none of the parties questions the fact that 42 Pa.C.S. § 8305 extinguished a previously recognized cause of action for wrongful birth or contend that its provisions are inapplicable to Ms. James's claims. Accordingly, resolution of the question of the propriety of the two contested orders hinges upon a determination as to the constitutionality of 42 Pa.C.S. § 8305.

Appellants assert that 42 Pa.C.S. § 8305, by extinguishing causes of action for wrongful birth, interferes with a woman's abortion right by allowing a physician to both intentionally misrepresent and negligently fail to impart information impacting upon such a decision. Accordingly, they contend that 42 Pa.C.S. § 8305 impinges upon abortion rights and violates both the due process and equal protection clauses of the fourteenth amendment of the United States Constitution.[2] This issue, which is one of first impression,[3] is devoid of merit.[4]

---

2. Our review of the record reveals that appellant, in substantial conformity with the dictates of Pa.R.C.P. 235 and Pa.R.A.P. 521, provided the Attorney General's Office with notice of its constitutional challenge at both this level and the trial level. To date, the Attorney General has not expressed a willingness to intervene in the proceedings.

3. We note that amici curiae challenged the constitutionality of both the substantive provisions of 42 Pa.C.S. § 8305 and its retroactive application in *Butler v. Rolling Hill Hospital*, 382 Pa.Super. 330, 555 A.2d 205 (1989). However, as we determined that they failed to provide the Attorney General's Office with the appropriate notification, we declined to address those issues.

(Cont'd)

Appendix D

Preliminarily, we note that legislative encactments [sic], such as the challenged statutory provision, enjoying a strong presumption of constitutionality. *Dranzo v. Winterhalter,* 395 Pa. Super. 578, 577 A.2d 1349 (1990). Consequently, all doubts relating to the constitutionality of such an enactment must be resolved in its favor. *Id.* Thus, it is clear that a party raising a constitutional challenge has a heavy burden of rebutting the presumption of constitutionality and demonstrating that the statute clearly, plainly, and palpably violates constitutional precepts. *Id.* Utilizing these principles, we must examine the contested provision and determine whether either the due process or equal protection clauses of the fourteenth amendment render it unconstitutional.

(Cont'd)

Two years after *Butler* was decided, we considered similar challenges in *Jenkins v. Hospital of the Medical College of Pennsylvania,* 401 Pa.Super. 604, 585 A.2d 1091 (1991) (*en banc*). In that case, we concluded that retroactive application of 42 Pa.C.S. § 8305 (a) to bar a cause of action tht accrued four years prior to its enactment was unconstitutional. Accordingly, we reversed an order striking certain provisions of a complaint. In light of this disposition, we did not address any of the substantive challenges.

4. Appellees Harvey L. Neiman, M.D., and Radiology Associates of Western Pennsylvania, P.C., assert that appellants' constitutional challenge is moot. In support of this assertion, they point out that appellants admitted in the complaint that Louis's average gestational age was over twenty-five weeks at the time that the alleged failure to notify occurred, *see* Reproduced Record ("R.R.") at 78a, and that physicians are prohibited by 18 Pa.C.S. § 3211 (a) from performing abortions on fetuses with a gestational age over twenty-four weeks. However, we not that 18 Pa.C.S. § 3211 (a) is a criminal provision that became effective in January, 1990, over two years after the relevant events occurred. *See* R.R. at 77a. Furthermore, the provision's retroactive application would render it an ex post facto law in violation of article 1 section 10 of the United States Constitution. Accordingly, as we find that 18 Pa.C.S. § 3211 (a) could not have affected Ms. James's ability to obtain an abortion at the relevant time, it is clear that the mootness claim is devoid of merit.

Appendix D

In pertinent part, 42 Pa.C.S. § 8305 (footnotes omitted) states:

> (a) Wrongful birth. —There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman, or on account of physical injury suffered by a woman or child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defense against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or any other act regulating the professional practices of health care practitioners.

It long has been clear that in order to establish a fourteenth amendment violation, a litigant must demonstrate state action or involvement in connection with the matter at issue. *See Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1948). Furthermore, a state normally may be held responsible for private conduct only when it has "exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the [s]tate." *Blum v. Yaretsky,* 457 U.S. 991, 1004, 102 S.Ct. 2777, 2786, 73

L.Ed.2d 534, 546 (1982). As mentioned previously, appellants assert that the statutory provision at issue impinges upon a woman's right to obtain an abortion, a right that with some qualifications was recognized by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973). However, our review of the clear language contained within that provision reveals that it neither regulates nor directly affects such rights. Instead, that language merely extinguishes all causes of action arising from a claim that but for the improper conduct of a medical provider, a child would have been aborted prior to birth. Thus, resolution of the state action issue rests upon the determination of whether 42 Pa.C.S. § 8305 (a) encourages medical providers to infringe upon the abortion rights of their patients.

The Osteopathic Medical Practice Act, 63 P.S. § 271.1 *et seq.*, and the Medical Practice Act of 1985, 63 P.S. § 422.1 *et seq.*, respectively create the State Board of Osteopathic Medicine and the State Board of Medicine. In addition, they establish licensing procedures for various medical professionals, including physicians, and provide that licenses may be refused, revoked, or suspended for certain enumerated reasons. According to the two acts, physicians may be disciplined by the appropriate boards for making intentional misrepresentations in connection with patient care. *See* 63 P.S. §§ 271.15 (a) (2) and 422.41 (2). Thus, if a physician intentionally misrepresented to a woman the state of her health or that of her fetus in an effort to infringe upon her abortion rights, he could be disciplined by the appropriate licensing authority. Since 42 Pa.C.S. § 8305 (a) specifically indicates that it provides no defense to a disciplinary proceeding involving such misrepresentations, it clearly does not encourage physicians to make them. Consequently, we turn to the question of whether the challenged provision encourages negligent behavior on the part of

physicians with respect to the impartation of information affecting abortion decisions.

Although the provisions of 42 Pa.C.S. § 8305 (a) clearly relieve physicians from liability for negligently failing to provide women with information affecting abortion decisions, we would be engaging in speculation were we to assume that this extinguishment of liability encourages such improper behavior. Thus, it is clear that the issue of the challenged provisions's effect is open to question. Since all doubts relating to the constitutionality of a statutory provision must be resolved in its favor, *see Dranzo v. Winterhalter, supra,* we must presume that 42 Pa.C.S. § 8305 (a) does not encourage physicians to engage in the negligent conduct at issue.

As demonstrated above, 42 Pa.C.S. § 8305 (a) does not encourage either intentional misrepresentations or the negligent impartation of information relating to abortion rights. Consequently, that provision does not amount to state action affecting such rights, and appellants' fourteenth amendment claims must fail.[5] Since 42 Pa.C.S. § 8305 is constitutional, the trial courts properly could have relied upon it to dismiss Ms. James's claims as not supporting a cause of action.[6]

---

5. We note that our decision in this regard is consistent with one reached by the Supreme Court of Minnesota in connection with a statutory provision which indicated that no person may pursue a cause of action premised upon a claim that a child would have been aborted absent the acts or omissions of another. In *Hickman v. Group Health Plan,* 396 N.W.2d 10 (Minn. 1986), tht court, citing *Shelley v. Kraemer, supra,* determined that the provision in question did not directly affect the right of a woman to obtain an abortion. Consequently, it concluded that the plaintiffs had established no state action relating to that matter.

6. We uphold the statutory bar relating to the maintenance of causes of action

(Cont'd)

Appendix D

Orders affirmed.

WIEAND, J. FILES A CONCURRING OPINION

(Cont'd)
premised upon assertions that but for the improper acts of another a child would not have been born. However, our decisions does not impact upon the right of a mother to recover under ordinary malpractice principles for treatment rendered her by a medical provider during the period of gestation. Appellants clearly indicated in their complaints that these actions were premised upon the former theory and they do not challenge the applicability of the provisions contained in 42 PaC.S. § 8305.

Appendix D

IN THE SUPERIOR COURT OF
PENNSYLVANIA

No. 83 Pittsburgh, 1991

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Appellants

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES OF WESTERN PENNSYLVANIA P.C., NEAL B. SIMONS, M.D. and HARVEY L. NEIMAN, M.D.,

Appellees

Appeal from Order of the Court of Common Pleas, Civil Division, of Allegheny County, No. 90-16421.

No. 146 Pittsburgh, 1991

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Appellants

vs.

WYNNE COOPER, M.D.,

Appellee

Appeal from Order of the Court of Common Pleas, Civil Division, of Allegheny County, No. GD89-18962.

Appendix D

BEFORE: CAVANAUGH, WIEAND AND HETER, JJ.

CONCURRING OPINION BY WIEAND, J.:

FILED April 30, 1992

I concur in the result. In my judgment, 42 Pa. C.S. § 8305 is rationally designed to meet a legitimate state interest and, therefore, is constitutional. In this respect, I would adopt the reasoning of the Honorable David S. Cercone who, in entering judgment on the pleadings in favor of the physician-defendant, wrote as follows:

"We believe that our legislature unquestionably had a rational basis for enacting section 8305. Senator Rocks provided the following viewpoint during debate on this legislation:

> 'this is the intent of what the wrongful birth and wrongful life legislation is about to stop a court engendered policy which views the birth of a child, be that child handicapped or otherwise, as a damaging event for which someone should be punished in order to prevent this quality of life ethic from becoming so pervasive that a handicapped child is routinely considered better off dead and of less value than what we would call a 'normal child' and to prevent the practice of medicine especially obstetrics and gynecology, from becoming coerced into accepting eugenic abortion as a condition for avoiding what are particularly wrongful birth lawsuits.' Pa. Senate leg. 1961 (March 22, 1988).

Appendix D

Other proffered rationale for this statute are also persuasive. The legislature believed that it would be improper to view any birth as an evil or wrong, and thus a cause of action. Secondly, our society has become increasingly aware and protective of the rights of the handicapped. To recognize the validity of a wrongful life statute would be to make the handicapped a lower class of citizen. Third, the recognition of these type causes of action by the legislature would, in essence, have dictated to the medical profession how to practice in the area of obstetrics. Finally, a recognition of these causes of action would have caused every increasing malpractice insurance rates to increase exponentially, with a resulting loss of adequate medical care in this vital area. See Pa. House Leg. 2306 (February 24, 1988).

We believe that section 8305 has a rational basis designed to meet a legitimate state interest. The legislature has not opted to make physicians exempt for their wrongdoings. Rather, the legislature has validly freed physicians from liability for defects or handicaps for which the physician is in no way responsible.

We are persuaded by the arguments of Justice Nix in the *Speck* decision. See 439 A.2d at 118, 120-21. We agree with Justice Nix that '. . . any intimation that a recognition is required of these proffered causes of action because of constitutional mandate is completely without foundation.' 439 A.2d at 120. '. . . [T]here can be no question that refusal to create new tort liability does not constitute protected access to interference with the constitutionally protected access to abortion.' 439 A.2d at 120.

We believe that the refusal of our legislature to recognize a cause of action for wringful birth and wrongful life 'does not impede the decision of the parents' regarding procreation, nor does it impede a women's right to choose to have an abortion. See *Speck*, 439 A.2d at 121"

APPENDIX E — OPINION OF JUDGE DAVID S. CERCONE DATED JUNE 28, 1991

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

NO. GD 89-18962

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Plaintiffs,

vs.

WYNNE COOPER, M.D.,

Defendant.

OPINION

By: David S. Cercone, J.
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Counsel of Record:

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Appendix E

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

NO. GD 89-18962

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANIEKA JAMES, in her own right,

Plaintiffs,

vs.

WYNNE COOPER, M.D.,

Defendant.

OPINION

By: David S. Cercone, J.

Plaintiff has appealed from our order granting Defendant's Motion for Judgment on the Pleadings in a case involving claims for wrongful birth and wrongful life.

Plaintiffs allege that Plaintiff-Mother, a teenager, obtained the services of Defendant after learning that she was pregnant. Plaintiffs allege that sonograms administered to Plaintiff-Mother revealed abnormalities to Plaintiff-Child. Plaintiff-Mother contends that she would have terminated her pregnancy if she had been advised in a timely fashion of the potential for these abnormalities. Plaintiff-Mother does *not* allege that this fact was ever communicated to Defendant. Plaintiff-Child, who was ultimately born with birth defects, alleges that the would be better off had he not been born.

Appendix E

42 Pa. C.S. Section 8305 provides as follows:

> (a) Wrongful birth — There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born. Nothing contained in this subsection shall be construed to prohibit any cause of action or award of damages for the wrongful death of a woman, or on account of physical injury suffered by a woman or a child, as a result of an attempted abortion. Nothing contained in this subsection shall be construed to provide a defense against any proceeding charging a health care practitioner with intentional misrepresentation under the act of October 5, 1978 (P.L. 1109, No. 261), known as the Osteopathic Medical Practice Act,[1] the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985,[2] or any other act regulating the professional practices of health care practitioners.
>
> (b) Wrongful life — There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act of omission of the defendant, the person would not have been conceived or, once conceived, would or should have been aborted.

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1. 63 P.S. § 271.1 et. seq.

2. 63 P.S. § 422.1 et seq.

Appendix E

(c) Conception — A person shall be deemed to be conceived at the moment of fertilization.

1988, April 13, P.L. 336, No. 47, § 2, imd. effective.

Present law, if constitutional, clearly precludes Plaintiff's causes of action. *See Butler v. Rolling Hill Hospital,* 382 Pa. Super. 330, 555 A.2d 205, 207 (1989), appeal denied, 522 Pa. 623, 564 A.2d 915.

Plaintiffs challenge the constitutionality of this section, relying in part on *Speck v. Finegold,* 497 Pa. 77, 439 A.2d 110 (1981). The *Speck* decision predated the legislative enactment of section 8305. Further, *Speck* did not recognize the causes of action sought to be pursued by plaintiffs. Rather, an evenly divided court upheld the lower court's dismissal of a cause of action for "wrongful life."

Plaintiffs allege that Defendant was negligent or reckless by failing to advise Plaintiff-Mother of her ability to terminate the pregnancy, and that by failing to so advise, Defendant denied Plaintiff-Mother the full opportunity to decide whether to abort or whether to carry her child to term. Plaintiffs, in essence, allege that doctors have the affirmative duty of explaining the potential for abortion, even where not raised by the patient. Plaintiffs also allege that doctors have the affirmative duty of explaining the potential for abortion, even where not raised by the patient. Plaintiffs also allege that the wrongful birth statute interferes with the patient's procreative decision and a women's right to choose whether to have an abortion, and is in violation of the equal protection clause. We believe that Plaintiffs contentions are without merit.

Appendix E

Plaintiffs concede that our legislature enjoys wide latitude in regulating tort actions and approving or disapproving new cause of action. Our legislature has seen fit to disapprove of the causes of action advanced by Plaintiffs.

We believe that our legislature unquestionably had a rational basis for enacting section 8305. Senator Rocks provided the following viewpoint during debate on this legislation:

> "this is the intent of what the wrongful birth and wrongful life legislation is about to stop a court engendered policy which views the birth of a child, be that child handicapped or otherwise, as a damaging event for which someone should be punished in order to prevent this quality of life ethic from becoming so pervasive that a handicapped child is routinely considered better off dead and of less value than what we would call a 'normal child' and to prevent the practice of medicine especially obstetrics and gynecology, from becoming coerced into accepting eugenic abortion as a condition for avoiding what are particularly wrongful birth lawsuits." Pa. Senate leg. 1961 (March 22, 1988).

Other proffered rationale for this statute are also persuasive. The legislature believed that it would be improper to view any birth as an evil or wrong, and thus a cause of action. Secondly, our society has become increasingly aware and protective of the rights of the handicapped. To recognize the validity of a wrongful life statute would be to make the handicapped a lower class of citizen. Third, the recognition of these type causes of action by the

legislature would, in essence, have dictated to the medical profession how to practice in the area of obstetrics. Finally, a recognition of these causes of action would have caused ever increasing malpractice insurance rates to increase exponentially, with a resulting loss of adequate medical care in this vital area. See Pa. House Leg. 2306 (February 24, 1988).

We believe that section 8305 has a rational basis designed to meet a legitimate state interest. The legislature has not opted to make physicians exempt for their wrongdoings. Rather, the legislature has validly freed physicians from liability for defects or handicaps for which the physician is in no way responsible.

We are persuaded by the arguments of Justice Nix in the *Speck* decision. See 439 A.2d at 118, 120-21. We agree with Justice Nix that ". . . any intimation that a recognition is required of these proffered causes of action because of constitutional mandate is completely without foundation." 439 A.2d at 120. ". . . [T]here can be no question that refusal to create new tort liability does not constitute governmental interference with the constitutionally protected access to abortion." 439 A.2d at 120.

We believe that the refusal of our legislature to recognize a cause of action for wrongful birth and wrongful life "does not impede the decision of the parents" regarding procreation, nor does it impede a women's right to choose to have an abortion. See *Speck*, 439 A.2d at 121.

For the within reasons, judgment on the pleadings was properly entered for Defendant.

BY THE COURT:
s/ D. Cercone, J.

Date: June 28, 1991

APPENDIX F — MEMORANDUM OPINION OF JUDGE JAMES H. MCLEAN DATED JANUARY 22, 1991

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

NO. GD 90-16421

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Plaintiffs,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES of WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D., and HARVEY L. NEIMAN, M.D.,

Defendants.

MEMORANDUM OPINION

MOTIONS

Filed by the Honorable
James H. McLean

Counsel of Record:

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Appendix F

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

NO. GD 90-16421

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Plaintiffs,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES of WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D., and HARVEY L. NEIMAN, M.D.,

Defendants.

McLEAN, JR. January 22, 1991

MEMORANDUM OPINION

In early June of 1988 Plaintiff Taneika James learned that she was pregnant. On October 25, 1988 and December 27, 1988 she underwent sonography. The December 27, 1988 sonogram showed the existence of a porencephalic cyst. On February 12, 1989 Ms. James went into labor and her child Louis Edmonds was delivered by Caesarean section. Louis was diagnosed as suffering from quadrigeminal arachnoid cysts as well as hydrocephalus, conditions which will require medical attention throughout his life.

Ms. James brought this suit on behalf of herself and her son alleging that the child's adnormalities were apparent from the October 1988 sonogram but were not communicated to Ms. James'

obstetrician until the time for Ms. James to have legally aborted her pregnancy was passed. Ms. James claims that as a result of this negligence she was deprived of her opportunity to choose whether to terminate the pregnancy, was subjected to the pain and trauma of amniocentesis on two occasions as well as the suffering of childbirth, and will continue to be subjected to the pain, anxiety and inconvenience attendant on caring for a hydrocephalic child. On behalf of Louis, Ms. James seeks recovery for the suffering associated with his condition.

Preliminary Objections were brought by all Defendants on the basis that the Complaint fails to state a cause of action in light of 42 Pa. CSA § 8305. On November 30, 1990 the Preliminary Objections were sustained as to all Defendants.

In Pennsylvania claims for wrongful birth or wrongful life are specifically prohibited by statute, 42 Pa. CSA § 8305.

Section 8305(a) states:

> Wrongful birth. — There shall be no cause of action or award of damages on behalf of any person based on a claim that, but for an act or omission of the defendant, a person once conceived would not or should not have been born.

Section 8305(b) states:

> Wrongful life. — There shall be no cause of action on behalf of any person based on a claim of that person that, but for an act or omission of the defendant, the person would not have been

conceived or, once conceived, would or should have been aborted.

Plaintiffs concede that their cause of action comes within the ambit of 42 Pa. CSA § 8305 but contend that the statute is unconstitutional and therefore should not bar their right to relief. While cognizant of the suffering attendant upon bearing a child with physical defects, the Court is also aware that in this case the child's problems were not initially caused by any act of the defendants and were not preventable by any means less drastic than abortion. Especially since the statute barring suits for wrongful birth and wrongful life has been upheld despite constitutional challenge, *Butler v. Rolling Hill Hospital,* 555 A.2d 205 (Pa. Super. 1989), it must operate to bar this action.

For the foregoing reasons the order of November 30, 1989 should stand.

APPENDIX G — ORDER OF COURT OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA DATED NOVEMBER 30, 1991

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

NO. GD 90-16421

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Plaintiffs,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES of WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D., and HARVEY L. NEIMAN, M.D.,

Defendants.

ORDER OF COURT

Sustaining Preliminary
Objections

Filed by the Honorable
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Appendix G

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

NO. GD 90-16421

LOUIS EDMONDS, a minor by TANEIKA JAMES, mother and natural guardian, and TANEIKA JAMES, in her own right,

Plaintiffs,

vs.

THE WESTERN PENNSYLVANIA HOSPITAL, RADIOLOGY ASSOCIATES of WESTERN PENNSYLVANIA, P.C., NEAL B. SIMMONS, M.D., and HARVEY L. NEIMAN, M.D.,

Defendants.

ORDER OF COURT

AND NOW, to-wit, this 30th day of November, 1990, upon consideration of Preliminary Objections filed by all Defendants, it it hereby ORDERED that said Preliminary Objections are sustained.

BY THE COURT:

s/ McLean, J.